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No. 90-363

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

CARLOS LUNA,
Petitioner

v.

SUPERIOR COURT OF THE
COMMONWEALTH OF MASSACHUSETTS,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether petitioner, a ten-year veteran of the Boston Police Department, who, with the advice of counsel, and without invoking his Fifth Amendment privilege against self-incrimination, submitted a signed, written affidavit to the Superior Court for the Commonwealth of Massachusetts, "testified" voluntarily for purposes of the "waiver-by-testimony" doctrine.

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The Commonwealth of Massachusetts respectfully requests that the petition for writ of certiorari be denied.

OPINION BELOW

Respondent is not dissatisfied with the petitioner's citation of the opinion below.

JURISDICTION

Respondent is not dissatisfied with petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

The Commonwealth adopts the facts as set forth in the opinion of the Supreme Judicial Court of Massachusetts in Commonwealth v. Lewin, 405 Mass. 566 (1989), and Luna v. Superior Court, 407 Mass. 747 (1990).

The facts relevant to the instant petition are as follows:

On February 17, 1988, petitioner, then a detective with the Drug Control Unit of the Boston Police Department, applied for and received a search warrant to search the premises of the third floor apartment of 102 Bellevue Street in Boston. In said application, sworn under the pains and penalties of perjury, petitioner stated that he had received

information concerning drug distribution at that address from a reliable informant referred to as "IT." Luna detailed that "IT" described the drug dealer as a 5'6", Hispanic man named Stevie who sold cocaine through a hole in the door of the third floor apartment at 102 Bellevue Street. Petitioner further stated that he, Luna, had purchased cocaine at that address on each of the two days preceding February 17, 1988. Commonwealth v. Lewin, 405 Mass. 566, 567-568 (1989).

During the attempted execution of the search warrant, Detective Sherman Griffiths was fatally shot. Albert Lewin, a 6'2" Jamaican man was subsequently arrested and indicted for the murder of Detective Griffiths. Id. at 568.

Prior to his execution of the affidavit which is the focus of the instant waiver-by-testimony inquiry,

petitioner testified concerning the February 17, 1988, search warrant in Court proceedings in Commonwealth v. Lewin, on two separate occasions. First, during Lewin's probable cause hearing, petitioner testified consistently with the facts stated in his application for search warrant. That is, he reiterated that he personally had purchased cocaine at 102 Bellevue Street on two occasions, and that his informant had provided information concerning the alleged Hispanic man who sold drugs at that address. Id. at 569-570.

After Lewin had been indicted, Lewin successfully moved for disclosure of the identity of the informant referred to in Luna's search warrant affidavit and production of that informant.[1/]

1/ According to Luna's search warrant, his informant had described the person selling drugs out of the third floor

(footnote continued)

When the Commonwealth failed to identify or produce the informant, Lewin moved for dismissal of the indictments. An evidentiary hearing was subsequently held on that motion. Id.

At the hearing, petitioner testified over the course of three days concerning, among other things, how and where he first met the informant "IT" (identified by petitioner at the hearing as "John"),

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(footnote continued)

apartment at 102 Bellevue Street as a 5'6" Hispanic man named Stevie.

Detective Griffiths was fatally shot during the attempted execution of the search warrant by a bullet that passed through the door of the third floor apartment at 102 Bellevue Street. There were no known eye witnesses to the shooting.

Albert Lewin, a 6'2" Jamaican man was subsequently arrested for the murder of Detective Griffiths. The asserted theory for the motions to produce and identify the informant was that the informant, who had allegedly seen a 5'6" Hispanic man named Stevie selling drugs out of 102 Bellevue Street only days before the attempted execution of the warrant, could provide exculpatory information.

his relationship with John, his attempts to locate John, and the use of John as an informant for the 102 Bellevue Street investigation and for some thirty-one other search warrants. After hearing and argument, the Superior Court (Grabau, J.) dismissed the indictments against Lewin. Id. at 570-571.

After dismissal of the indictments, the Commonwealth petitioned the court for reconsideration citing new information about the informant. Specifically, on February 27, 1989, the Commonwealth informed the court that it had discovered that petitioner's February 17, 1988, application for search warrant was false (i.e., that Luna had not personally purchased cocaine at 102 Bellevue Street and that Luna had not received any information from his alleged informant John regarding drug operations at that address), and that petitioner, his

sergeant, and possibly a third officer had given false testimony or provided false information to the court concerning the informant John (i.e., there was no informant who had either been inside the apartment or knew of a 5'6" Hispanic man named Stevie who sold drugs out of the third floor apartment of 102 Bellevue Street). The Commonwealth therefore argued that there was no unidentified or missing informant who could provide exculpatory information to the defense. The Superior Court (Grabau, J.) directed Detective Luna, among others to file affidavits. Id. at 574. The court expressly observed on the record, however, that Luna and the others might invoke the Fifth Amendment and decline to file affidavits. Luna v. Superior Court, 407 Mass. 747, 748-749 (1990).

On March 12, 1989, approximately two weeks after the court's order, Luna

executed and signed a written affidavit regarding his involvement in the investigation of 102 Bellevue Street, and his knowledge of and relationship with various informants he used at that address. In connection with the filing of that affidavit, the court (Grabau, J.) made inquiry of Luna's attorney who indicated that he had advised Luna as to the possible consequences of submitting the affidavit. Commonwealth v. Lewin, 405 Mass. at 575.

Despite the revelation of the above described new evidence concerning the informant, the Superior Court denied the prosecution's petition for reconsideration, and the Commonwealth appealed. Id. at 578.

The Supreme Judicial Court reinstated the indictments. Commonwealth v. Lewin, 405 Mass. at 588. In essence, the Supreme Judicial Court concluded that

because the record disclosed that there was no informant "John" who could provide exculpatory evidence to the defense, Lewin could receive a fair trial. Id. at 582-583.

In December, 1989, Lewin renewed his motion to dismiss the indictments citing alleged complicity on the part of the Office of the District Attorney and the Homicide Division of the Boston Police Department in the "cover up" of the informant's identity. In connection with hearings on said motion, Lewin called Luna as a witness. Petitioner, for the first time (i.e., after twice testifying orally and once testifying by submission of his March, 1989, affidavit), invoked his privilege against self-incrimination. Luna v. Superior Court, 407 Mass. at 748.

The Superior Court (Irwin, J.) ordered Luna to testify, holding that

Luna, having voluntarily submitted an affidavit under oath in which he de facto admitted to having made misstatements in an earlier portion of the proceeding then before the court, waived his privilege against self-incrimination as to the subject matter stated in his affidavit. The court accordingly ruled that Lewin was entitled to cross-examine Luna on the details of the subject matter of the March, 1989 affidavit. Id. at 748-749.

Luna filed a petition for extraordinary relief pursuant to Mass. Gen. Laws c. 211, §3 seeking to invoke the superintendency powers of the Single Justice of the Massachusetts Supreme Judicial Court over the trial court. The Single Justice (Wilkins, J.) affirmed the lower court's Order and denied the petition. Luna appealed the decision of the Single Justice to the full bench of the Supreme Judicial Court. Id.

During the pendency of the appeal, Luna was re-called as a witness in the hearing on Lewin's dismissal motion. At that juncture, Luna, represented and accompanied by counsel, neither refused to testify nor asserted his privilege as to any question. Rather, on January 11 and 16, 1990, petitioner testified and answered all questions asked by defense counsel and by the assistant district attorney. See Luna v. Superior Court, 407 Mass. at 748-749 ("The [motion] judge observed that 'Luna's testimony far exceeded the limited scope this court prescribed in its . . . decision [granting Lewin's motion to compel Luna to testify],' and that Luna testified 'comprehensively and fully' in connection with the renewed motion to dismiss.").

Lewin's renewed motion to dismiss was denied.

Thereafter, Lewin moved to compel Luna's testimony at trial. Luna informed the court that if called as a witness during the Lewin trial, he would assert the privilege against self-incrimination. Id. at 749. The Superior Court (Irwin, J.) again ruled that Luna would have to testify due to his "waiver-by-testimony" of the privilege. Luna again filed a petition for relief pursuant to Mass. Gen. Laws c. 211, §3, to the Single Justice (Greaney, J.) who denied the petition. Id. at 750. Luna appealed the Single Justice's ruling to the full bench of the Supreme Judicial Court, and moved to consolidate that appeal with his still-pending appeal from the prior Single Justice's order that he testify at the renewed motion to dismiss hearing.

The cases were consolidated before the full bench of the Supreme Judicial

Court. The Supreme Judicial Court determined that the first appeal, from the order of the Single Justice affirming Justice Irwin's order requiring Luna to testify during the hearing on Lewin's renewed motion to dismiss, was moot in light of petitioner's already having testified. Luna v. Superior Court, 407 Mass. at 749. The Supreme Judicial Court ruled that as to the second appeal, from the Superior Court's order requiring Luna to testify at the Lewin trial, Luna had voluntarily waived-by-testifying his privilege against self-incrimination by submitting the March, 1989, affidavit. Id. at 750-751.

Luna now seeks review of the judgment and opinion of the Supreme Judicial Court compelling his testimony at trial. The ground raised is the narrow issue whether, for purposes of the waiver-by-testimony doctrine, Luna

"voluntarily waived" his Fifth Amendment privilege when he executed and filed his March 12, 1989, affidavit.

REASONS FOR NOT GRANTING THE WRIT

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BECAUSE PRIOR DECISIONS OF THIS COURT UNIFORMLY HOLD THAT WHERE A WITNESS TESTIFIES, RATHER THAN CLAIMING THE PRIVILEGE, THAT WITNESS LOSES THE PROTECTION OF THE PRIVILEGE AND CANNOT BE SAID TO HAVE BEEN "COMPELLED" TO TESTIFY.

Under the Fifth Amendment, a witness must claim the privilege in order to be afforded its protection.[2/] "The

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2/ The Court has carved out narrow exceptions to this general principle where the threat of compulsory self-incrimination is so great as to virtually eviscerate any real choice on the part of the individual to assert the privilege. See Garner v. United States, 424 U.S. 648, 657, 658-661 (1976) (concluding that one such exception is made for coerced custodial confessions because "the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent"). In addition, the Garner Court

(footnote continued)

Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." Garner v. United States, 424 U.S. 648, 654-655 (1976), quoting United States v. Monia, 317 U.S. 424, 427 (1943) (emphasis supplied). The Garner Court explained the above-stated rule: "Only the witness

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(footnote continued)

noted two other exceptions: (1) where the threat of failing to file or filing a tax return was in itself incriminating; and (2) where police officers were told that assertion of the privilege would result in discharge. Id. No "exception" is applicable in the instant case where the only alleged interference with petitioner's decision as to whether or not to invoke his right to remain silent is petitioner's allegation that he was told (it is not indicated by whom) that if he failed to file an affidavit the case against Lewin would be dismissed.

knows whether the . . . disclosure may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled." Garner v. United States, 424 U.S. at 655. Thus, this Court does not apply any "waiver" or "voluntariness" analysis where an ordinary witness testifies instead of claiming the privilege. Rather, the only relevant consideration is whether the witness invoked the privilege.

In addition, federal law is uniform that once a witness testifies about facts without invoking the privilege, he may be compelled to further testify about the details of the subject matter about which he has testified. Rogers v. United States, 340 U.S. 367, 373 (1951) (holding that where a witness testifies about an

incriminating fact "[r]equiring full disclosure of details . . . does not rest upon a further 'waiver' of the privilege against self-incrimination"); United States v. Johnson, 488 F.2d 1206, 1210 (1st Cir. 1973); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958); In re Neff, 206 F.2d 149, 152 (3d Cir. 1953). Where, as here, petitioner (with advice of counsel) submitted a signed affidavit to the Superior Court without invoking his privilege, the decision of the Supreme Judicial Court affirming the order of the Superior Court compelling Luna's further testimony in the same proceeding was correct.

The affidavit signed and filed by petitioner is, for purposes of Fifth Amendment analysis, the "testimony" of a witness. Thus, since petitioner submitted an affidavit instead of claiming the privilege, his petition for

writ of certiorari should be denied by "an application of the general requirement that witnesses must claim the privilege," Garner v. United States, 424 U.S. at 656, or lose its protection. Petitioner raises no claim which would entitle him to be excepted from the general rule. See n.2, supra at 14-15.

Petitioner contends, however, that the facts before the Supreme Judicial Court did not provide sufficient basis for a conclusion that he "waived" his Fifth Amendment privilege with "full awareness of the nature of the right and the consequences of the decision to abandon it." (Brief of Petitioner at 19). Thus, petitioner alleges he could not have been compelled to further testify. Petitioner's analysis, however, is fundamentally flawed both legally and factually.

First, petitioner's argument relies on inapposite cases for his contention that a witness who testifies without invoking the privilege must be found to have made a knowing and intelligent waiver of his privilege against self-incrimination before he can be compelled further to testify. The decisions of this Court make it clear that the witness's loss of the ability to rely on the privilege is not based on waiver principles. As this Court explained in Garner v. United States, 424 U.S. at 654 n.9:

> the cases do not apply a 'waiver' standard as that term was used in Johnson v. Zerbst, 304 U.S. 458 (1938), and we recently have made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver. [citation omitted]. Moreover, it seems desirable to reserve the term "waiver" in these cases for the process by which one affirmatively renounces the protection of the privilege.

See Taylor v. Commonwealth, 369 Mass. 183, 189 (1975) ("This doctrine of 'waiver by testimony' . . . is not based on any true waiver theory at all in the usual sense of a voluntary, intelligent relinquishment of a known right"), citing Rogers v. United States, 340 U.S. at 373. Thus, petitioner's reliance on the custodial interrogation cases (Brief of Petitioner at 19) for his argument that an ordinary witness who testifies without invocation of the privilege must be found to have "voluntarily waived" the privilege is misplaced.

Second, the Supreme Judicial Court specifically found:

> the record in this case provides ample basis upon which to conclude that the testimony contained in the petitioner's affidavit was provided voluntarily. . . . The petitioner specifically testified that he had numerous meetings with his attorney to decide whether to submit an affidavit. He testified that he knew that by filing the affidavit he was

> 'cutting [his] head off,' but that such was necessary if the indictment was to be reinstated.

Luna v. Justices of the Superior Court, 407 Mass. at 750 (1990).

The record before the Supreme Judicial Court disclosed: (1) that petitioner, a ten-year veteran of the Boston Police Department, had been advised by his attorney of his rights and of the consequences of filing the affidavit by his attorney; (2) that petitioner had thrice testified before invoking the privilege; (3) that petitioner did not file his March 12, 1989, affidavit until two weeks after the court's order and thus could execute his affidavit "at leisure and with legal assistance [and] is even less subject to the psychological pressures at issue in Miranda than a witness who has been called to testify in judicial proceedings," Garner v. United States,

424 U.S. at 658; and (4) that the trial court fully understood that its order was subject to the petitioner's privilege not to testify. In short, the conclusion of the Supreme Judicial Court, that the record before it provided "ample basis" upon which to find that petitioner voluntarily submitted his March 12, 1989, affidavit, was correct.

Where, as here, petitioner wholly failed to invoke his Fifth Amendment privilege, but instead testified about incriminating facts, the decision below compelling further testimony was correct. Moreover, insofar as petitioner raises a claim that this Court should delve beyond his undisputed failure to invoke and determine whether petitioner "voluntarily" submitted his affidavit to the court, the Commonwealth contends that the Supreme Judicial Court correctly

applied well-settled federal and state law to the facts before it. There was no error.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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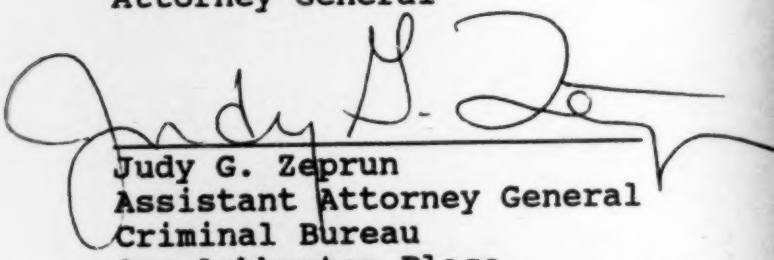

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